DOCUMENT RESUME

ED 275 017 CS 505 396

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TITLE Important and Unimportant Organizational Communication: Public Employee Freedom of Speech after "Connick v. Myers."
PUB DATE May 86
NOTE 28p.; Paper presented at the Annual Meeting of the International Communication Association (36th, Chicago, IL, May 22-26, 1986).
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS Constitutional Law; *Court Litigation; Employer Employee Relationship; Federal Courts; *Freedom of Speech; *Government Employees; Labor Relations; Management Systems; Organizational Change; *Organizational Communication; *Organizational Effectiveness; *Public Agencies; Public Opinion
IDENTIFIERS *Connick v Myers; First Amendment

ABSTRACT

A review of 16 Federal Court of Appeals cases indicates the impact of the "Connick v. Myers" case on the nature of freedom of speech in public organizations. The case involved the firing of an assistant district attorney for circulating a job satisfaction survey after she was transferred to a less desirable section of the courts. Since the 1983 Supreme Court decision, the organizational communication of public employees has been constitutionally protected only if the communication pertains to a matter of public concern and outweighs any potential harm to organizational efficiency. The courts still lack a consensus on the matter of how communication within organizations affects and is affected by the outside environment. The factual situations of each case provide insights into how some managers try to control communication within their organizations. The courts continue to argue over what constitutes a "matter of public concern" and to weigh the interest of free communication against that of organizational efficiency. The following tentative conclusions about the effects of the Connick case on the issue of public employee freedom of speech can be drawn: (1) the Connick Test has encouraged judicial restraint, (2) considerable confusion exists regarding the timing of comments, and (3) the problem of actual or potential disruption clouds the protection of employee free speech. (JD)

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IMPORTANT AND UNIMPORTANT ORGANIZATIONAL COMMUNICATION: PUBLIC EMPLOYEE FREEDOM OF SPEECH AFTER CONNICK V. MYERS

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Presented at the 36th Annual Conference of the International Communication Association. May 22-26, 1986. Hyatt Regency Chicago Hotel. Chicago, Illinois USA

CS 505 396

ABSTRACT

IMPORTANT AND UNIMPORTANT ORGANIZATIONAL COMMUNICATION:
PUBLIC EMPLOYEE FREEDOM OF SPEECH AFTER CONNICK V. MYERS

After the 1983 Supreme Court decision in Connick v. Myers, the organizational communication of public employees is constitutionally protected only if the communication is about a matter of public concern and outweighs any harm or potential harm to organizational efficiency. This essay examines the nature of freedom of speech in public organizations after Connick by examining the case and sixteen Federal Court of Appeals cases which attempt to follow Connick. It is concluded that the courts are still having difficulty defining what is a matter of public concern and weighing the interest in free communication against the interest of organizational efficiency. It appears that great expansion of First Amendment protections is unlikely.

I. INTRODUCTION

Since 1968, the Supreme Court has recognized that the communication of public employees is entitled to some First Amendment protection. However, the Court has had trouble deciding how extensive that protection should be. A critical problem is deciding what types of expression merit attention by the courts. The justices have been torn between vigorous judicial oversight of organizational communication and judicial restraint in favor of broad management discretion. The issue came to a head in the narrow 5-4 decision in the 1983 case of Connick v. Myers.[1]

The purpose of this essay is to examine the law leading up to the Connick decision, the decision itself, and the lower court decisions made after Connick. The essay is an extension of research reported in a 1983 article in the Western Journal of Speech Communication.[2] That article discussed, in considerable detail, the development of law leading up to the Connick decision. The Connick case was decided on April 20, 1983 while the article was in print.

The discussion of cases in this essay might be interesting to organizational communication scholars for two reasons. First, the discussion focuses on how another profession, the judiciary, looks at communication within organizations; and looks at how that communication affects and is affected by the environment beyond organizational boundaries. Second, the factual situations of each case provide insight into how some managers use their power in attempts to control communication within their organizations.

II. LAW PRIOR TO CONNICK V. MYERS

The Constitutional concern over the free speech of public employees can be traced back to the landmark 1968 Supreme Court decision in Pickering v. Bd. of Education.[3] In the case, school teacher Marvin Pickering sought reinstatement after being dismissed for publishing a letter critical of a school board backed bond issue and the allocation of existing financial resources. Justice Marshall, writing for the Court, ruled that a balance must be struck between the interest of the public employee in ". . . commenting upon matters of public concern . . ." and the interest ". . . of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[4] Marshall further ruled that the balance should be applied on a case by case basis. Marshall ruled in favor of Pickering.

The Commenting Side

The creation of the Pickering balance, or Pickering calculus as it is sometimes known, left the courts scrambling to define the phrase "commenting on matters of public concern." Several Circuit Courts ruled that communication concerning such matters as a school district's financial ability to raise salaries[5] and a promotion decision in a fire department[6] were matters of public concern. On the other hand, some Circuit Courts ruled that communication concerning such matters as a new fireman's union,[7] selecting a university department chair,[8] and racial discrimination in the employment practices of a school district[9] were not matters of public concern.

The Supreme Court made an initial attempt at defining matters of public concern in the 1979 case Givhan v. Western Line Consolidated School District.[10] The Court looked at the issue in terms of communication aimed outside the organization and communication aimed only within the organization. Justice Rehnquist, writing for the Court, held that: "Neither the First Amendment itself or our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[11]

Although the Givhan decision clarified the external/internal communication question, it did not define the phrase "commenting upon matters of public concern." The federal circuit courts were still defining the phrase differently after Givhan and would have to wait until the Connick decision to receive guidance.[12]

The Organizational Efficiency Side

On the other side of the balance -- the interest of the State, as an employer, in protecting the efficiency of the public services it performs through its employees -- the lower courts were also left without much guidance. In the text and footnote 3 of the Pickering decision, Justice Marshall did suggest that in some situations factors such as discipline; co-worker harmony; confidentiality; and personal loyalty and confidence might be considered in a balance.[13] However he made it clear that cases should be decided on a case by case basis and that: "We intimate no view as to how we would resolve any specific instances of such situations . . . ."[14]

Even though Marshall admonished the courts to use the Pickering balance on a case by case basis, it should not be surprising that many circuits clung to Marshall's categories as a framework for using the balance. However, the Supreme Court and the lower courts later added, in effect, other factors which might weigh against speech. In the 1979 Givhan decision, Justice Rehnquist suggested that time, place, and manner considerations might be placed in the balance.[15] In addition, several circuits have held that damage to the good name of the organization should be placed in the balance. These cases have involved such factors as the misuse of school board letterhead,[16] avowed homosexuality,[17] and spreading wild rumors.[18]

In order to weigh the elements in the Pickering balance, the courts have had to decide who should shoulder the burden of proof and what standards of proof apply. In these cases the courts have held that the employee must first establish that he or she was dismissed or otherwise harmed by the employer in retaliation for protected communication. The burden then shifts to the employer to prove either that the same action would have been taken even without protected speech,[20] or that the communication harmed or threatened to harm organizational efficiency. The standard of proof for harm to organizational efficiency has caused the most controversy between the circuits, and in Connick, between the justices of the Supreme Court.

Prior to Connick, most circuits held to a standard of proof that generally required a showing of actual harm. The Second,[21] Fourth,[22] and Fifth Circuits[23] required that it be shown that the communication

would "materially and substantially" interfere with the efficiency of the organization. They borrowed the concept from the Supreme Court's decision in the student armband case of Tinker v. DesMoines Independent Community School District.[24] The D.C. Circuit used a specific finding of adverse effect standard, the Sixth Circuit used a meaningful interference standard,[26] and the Tenth Circuit used a real and important standard.[27] Although the actual wording of the tests were different, it is clear that these courts were looking for a definite causal relationship between communication and harm to efficiency.

However, the Eighth Circuit did not require that actual harm be shown but only a potential for harm. In Birdwell v. Hazelwood School District, Judge Smith, writing for the Court, ruled that: "In a situation of potential disruption, there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures."[28] Here again the courts had to wait for the Connick decision.

III. THE CONNICK V. MYERS DECISION

In 1983 the Supreme Court handed down another landmark decision. In Connick v. Myers, the Court addressed issues on both sides of the Pickering balance. The diverse viewpoints on the Court concerning freedom of speech is reflected in the narrow 5-4 vote and the heated dissent by Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens.

The case arose when Assistant New Orleans District Attorney Shelia Myers was transferred to prosecute cases in a different section of the criminal court. Myers, who strongly opposed the transfer, complained to several

supervisors and later distributed a questionnaire, usually during her lunch hour, to other Assistant District Attorneys. The questionnaire contained questions about office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. Myers was then fired for refusal to accept the transfer and for distributing the questionnaire which Harry Connick, the District Attorney, considered an act of insubordination.

Justice White was chosen to write the decision of the Court. His decision and Brennan's dissent are best analyzed by examining the interests on each side of the Pickering balance separately.

The Commenting Side

In Connick, Justice White finally attempted to define the phrase "matters of public concern." Although Justice White found that Myers's questionnaire was not ". . . wholly without First Amendment Protection,"[29] he found it was not, save for one question about pressure to serve on political campaigns, about a matter of public concern. To Justice White, if there is no matter of public concern, there is no need to even use the Pickering balance. According to Justice White:

> Pickering, its antecedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive

> oversight by the judiciary in the name of the First Amendment. . . . [W]hen a public employee speaks, not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[30]

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, offered a vigorous dissent. He argued that the concept of "commenting on matters of public concern" should not be narrowly defined by the courts and that the Pickering balance affords adequate attention to the inefficiency side as a mechanism to protect the public services. Brennan argued:

> . . . [I]n concluding that the effect of respondent's personnel policies on employee morale and the work performance of the District Attorney's Office is not a matter of public concern, the Court impermissably narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal. . . . [B]ased on its own narrow conception of which matters are of public concern, the Court implicitly determines that information concerning employee morale at an important government office will not inform public debate. To the contrary, the First Amendment protects the dissemination of such information so that the people, not the courts, may evaluate its usefulness.[31]

Thus, the Court, or at least a slim majority of the Court, held that matters of public concern must be distinguished from matters of personal concern.

However, the only guidance that the Court gave is that: "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[32] White distinguised the behavior of Bessie Givhan in Givhan v. Western Line Consolidated School District by finding that, "it is clear that Givhan's statements concerning school district's allegedly racially discriminatory policies involved a matter of public concern."[33] Justice Brennan, in his dissenting opinion, attacked White's reasoning:

> The Court seeks to distinguish Givhan on the grounds that speech protesting racial discrimination is "inherently of public concern" . . . . In so doing, it suggests that there are two classes of speech of public concern: statements "of public import" because of their content, form and context, and statements that, by virtue of their subject matter, are "inherently not of public concern." In my view, however, whether a particular statement by a public employee is addressed to a subject of public concern does not depend on where it was said or why. The First Amendment affords special protection to speech that may inform public debate about how our society is to be governed--regardless of whether it actually becomes the subject of a public controversy.[34]

The Organizational Efficiency Side

In Connick, Justice White found that question eleven on Myers's questionnaire, which concerned pressure to work in political campaigns, was protected speech and therefore triggered the Pickering balance. This gave the Court an opportunity to examine the standards of proof necessary to establish harm or a threat of harm to organizational efficiency. Justice White rejected the District Court's

use of a "substantial interference" standard and held that potential inefficiency could be determined by administrators and that their judgement of the danger of potential interference should carry great weight. Justice White ruled:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involves matters of public concern.[35]

Justice Brennan again took issue with the majority opinion in his dissent. Justice Brennan first argued that the courts and not the employer should make the final appraisal of harm to organizational efficiency. Justice Brennan then went on to examine the Supreme Court's earlier decision in a student armband case. According to Justice Brennan:

> Such extreme deference to the employer's judgment is not appropriate when public employees voice critical views concerning the operations of the agency for which they work. Although an employer's determination that an employee's statements have undermined essential working relationships must be carefully weighed in the Pickering balance, we must bear in mind that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech . . . . If the employer's judgment is to be controlling, public employees will not speak out when what they have to say is critical of their supervisors. In

> order to protect public employees' First Amendment right to voice critical views on issues of public importance, the courts must make thier own appraisal of the effects of the speech in question.
>
> . . . . . .
>
> In Tinker we found that "in our system, undifferentiated fear or apprehenshion of a disturbance is not enough to overcome the right to freedom of expression . . . ." Because the speech at issue addressed matters of public importance, a similar standard should apply here.[36]

It is clear after examining the cases after Pickering that the courts have had trouble in dealing with the State's interest in organizational efficiency. The Connick decision does not seem to eliminate the confusion completely, but makes the Pickering balance more complex.

IV. CASES AFTER CONNICK V. MYERS

The Connick decision means that, in effect, there is a two stage test that the courts must use in public employee free speech cases. The first stage is a determination of whether the employee's communication addresses any matter of political, social, or other concern to the community as determined by the content, from, and context of a given statement as revealed by the whole record. If the requirements of the first stage are met, then the communication is placed into the second stage of the test--the Pickering balance.

So far, the lower courts seem preoccupied with the first stage of the test. In this section, important lower court decisions relating to Connick will be examined. The cases will be divided into decisions where organizational

communication did not clear the Connick test and decisions where communication did clear the Connick test. The decisions within these two broad categories will be examined chronologically by the date of thier announcement.

Cases Which Did Not Clear the Connick Test

The Eleventh Circuit case of Jones v. State of Georgia concerned an employee of the Georgia Department of Human Resources who complained that he started work in May but was credited for starting in June, which had the effect of extending a probationary period of employment.[37] Chief Judge Godbold, writing for the Court, held that Jones's comments were not a legitimate public concern.

In Rowland v. Mad River Local School District, a high school vocational guidance counselor was fired after mentioning to a secretary, an assistant principal, and several other teachers that she was a bisexual and had a female lover.[38] Chief Judge Lively wrote the opinion for the Sixth Circuit Court of Appeals and held that Marjorie Rowland's comments were of personal concern because at the time of her statements, there was no evidence of any public concern in the community or at Stebbins High.

Judge Edwards dissented. He argued that Rowland's comments were of public concern because she made the comments in a confidential relationship, but that the situation later became a public controversy. According to Judge Smith:

> When, however, that speech was spread to school authorities and the community, plaintiff's adherence to her right both to be what she was and to state the fact brought down on her head the wrath of some parents and termination of her job by the ruling authorities of her

> school. There is evidence in this record that organized political pressures were involved in the ultimate nonrenewal/discharge. Clearly, at the point of discharge, there was a controversy in progress over an important public issue.[39]

The case was appealed, but in 1985 the Supreme Court refused to hear it.[40]

The Tenth Circuit in Wilson v. City of Littleton, Colorado faced the situation of a police officer being fired for not removing a black shroud on his badge, which was worn to mourn the death in the line of duty of a female police officer in another community.[41] Judge Seymour, writing for the Court, found that: "While the death of a police officer could conceivably be a topic of general interest to the public under other circumstances, Wilson's personal grief is not a matter 'of public concern' within the meaning of Connick."[42]

In Altman v. Hurst, the Seventh Circuit Court of Appeals heard a case where a Hickory Hills, Illinois police sergeant, instead of being dismissed, was subjected to bizarre efforts by his Chief of Police to punish him for allegedly encouraging another officer to appeal her suspension.[43] In addition to assigning Sergeant Altman to foot patrol duty and re-scheduling his vacation time, Police Chief Hurst ". . . reassigned plaintiff to a fixed post outside his window in front of the police station. [Altman] could not leave his post, even to go to the bathroom, without first requesting permission; nor was he reassigned indoor duty during inclement weather."[44] In a per curiam opinion, the Court ruled that Altman's alleged speech was not about matters of public concern and, despite expressing incredulity at the personnel practices of the police department, offered no relief.

Seven days later the Seventh Circuit decided another case which arose over what appears to be overreaction by government managers. In Yoggerst v. Hedges, Dorothea Yoggerst, an employee of the Illinois Governor's Office of Manpower and Human Development, was reprimanded for saying over the phone: 'Did you hear the good news.' The comment was in reference to newspaper reports that the agency's director had been fired by the governor. Judge Eschbach, writing for the Court, ruled that Yoggerst's remark centered on personal concern and not a matter of public concern, even though a matter of public concern ". . . provided the impetus for speaking."[46] Ironically, the same case had been before the Court once before -- three years before the Connick decision. Judge Cudahy wrote the decision in the 1980 case and said: "some governmental workers approve of their boss and some do not, but a merely casual indication of mild disapproval in a private conversation does not rise to the level of threat to the departmental order or harmony. Here the apparent overreaction . . . seems ludicrous."[47]

In Sipes v United States, a civilian employee of the Air Force claimed that he was dismissed because of complaints to the Inspector General of the Air Force concerning unfair treatment.[48] Chief Judge Holloway, writing for the Tenth Circuit, held that Arthur Sipes's comments did not touch on matters of public concern.

The Fourth Circuit Court of Appeals confronted the problem of a civilian employee of the Fairfax County, Virginia Police Department being demoted after leaking a copy of an audit report on the internal operations of the Police Department's Emergency Operations Center to the Washington

Post. In Jurgensen v. Fairfax County, Virginia Judge Russell, writing for the Court, found that the report brought to light no actual wrongdoing or breach of trust and obviously did not contain material of any substantial public concern.[49] Judge Ervin, in a concurring opinion, suggested that insubordination should not, ". . . automatically and irrevocably tip the scales in favor of the employer."[50] Senior Circuit Judge Butzner offered a dissenting opinion and argued that the report addressed a matter of public concern and that his disclosure was the sole reason for punishment.[51]

In the Fifth Circuit Case of Davis v. West Community Hospital, a medical doctor had his staff privileges permanently suspended, allegedly for writing letters to hospital supervisors concerning disputes with other personnel, ineffective patient treatment by another doctor, complaints about hospital board members, and the reassignment of his parking place.[52] Judge Hill, writing for the Court, addressed several issues but on the First Amendment question found Dr. Davis's letters not to address matters of public concern.

Finally the Fourth Circuit, in Lewis v. Blackburn, heard a case en banc concerning a state magistrate who was not reappointed after complaining about an order to begin microfilming small claims documents in addition to her other duties.[53] In an earlier hearing of the case, Judge Winter, writing for the Court, found that her complaints were on matters of public concern because high paid magistrates were spending much of their time microfilming and not deciding cases.[54] Judge Ervin did not think the matter was of public concern and dissented.[55] On rehearing en banc, the Court in a per curiam opinion agreed with the original dissent and found

no public concern. Judges Winter and Wilkinson dissented for the reasons laid out in the original majority opinion.

Cases Which Cleared the Connick Test

The Eleventh Circuit, in Perry v. Bailey, decided a case where they did not explicitly use the Connick test but went straight to the factors in the Pickering balance.[56] The case involved a complex factual situation where a sheriff's deputy, Jackson Berry, discovered that a politically well connected judge was receiving payoffs to protect dog fight gambling. After the Sheriff admonished the deputy to "cool it," the deputy made several arrests while breaking up a fight at "Jake's for Steaks." One of the arrests involved the same judge's daughter. The sheriff ordered Berry to drop the charges. Berry refused and added that ". . . he did not consider the Judge's daughter, [a teacher] a fit person to teach his children in any event."[57] The Sheriff asked Berry to resign and when he refused, fired him. The Sheriff ". . . indicated that his political supporters had told him that he would not be reelected if Berry remained on the payroll."[58]

Judge Tjoflat, delivering the opinion of the Court, while mentioning Connick and the dissents in Connick, really addressed factors in the Pickering balance. The Court found that no matter what test was used, direct insubordination in refusing to drop the charges could not be protected. According to Tjoflat: "While corruption in the Sheriff's office is a matter of legitimate public concern, it is not so vital a matter that it would justify our protection of an employee's flagrant defiance of his direct superior."[59]

In Brockell v. Norton, a police officer learned that a part-time officer had a copy of a certification test for officers before the test was to be given. After complaining to his chief and getting no action, he made an anonymous phone call to the regional authority in charge of testing, which was in violation of the unwritten chain-of-command policy in the police department.[60] Judge Heavey, writing for the Eighth Circuit Court of Appeals, found first that the public importance of the officer's comments "cannot be questioned" and that his acting as a whistle blower weighed heavily against harm to the efficiency of the department which was already inefficient and lacked harmony.

The Federal Circuit heard a case, Brown v. Dept of Trans., F.A.A., about an air traffic controller supervisor during the recent "PATCO" strike.[61] Although Harold Brown did not go out on strike and continued to work up to twelve hour shifts, he addressed a union meeting where he wished the strikers would come back and said that: 'I'm so happy that you're together. Stay together, please, because if you do you'll win.' He also told a television reporter that the strike was 'illegal' but that, 'I support some of the strike demands.'[62] His remarks were later broadcast on ABC's Nightline.

Judge Smith, writing for the Court, found that Brown's comments were on a matter of urgent public concern, but that the interest of the agency, in a national emergency, outweighed Brown's interest in free speech. The Court pointed out the seriousness of the illegal strike; the timing of the comments during return to work grace period; and the need for cooperation, loyalty, and trust among supervisors as factors to be weighed.

Smith rejected the contention that the agency must 'clearly demonstrate' that the communication 'substantially and materially' interfered with the F.A.A.

In the Fifth Circuit case of Wells v. Hico Independent School District, two teachers, Veriena Braune and Joyce Wells, requested and were granted permission to address the school board concerning a federally funded "Right to Read" program and their contentions that teachers active in the program were given discriminatorily low ratings on performance reviews.[63] They then became involved in a grievance action concerning the same issues. Judge Garwood, writing for the Court, held that a material portion of their speech pertained to matters of public concern because that prior to the speech, the issue was a subject of debate in the community.

The Ninth Circuit case of Anderson v. Central Point School District No. 6 involved a letter by a teacher-coach, which was sent to the school board concerning the athletic policies of the District.[64] In a per curiam opinion, the Court ruled that, in light of a board meeting set up to discuss the athletic program, the letter clearly addresses a matter of public concern. The Court agreed with the lower court's use of the Pickering balance which found that the communication outweighed any damage to efficiency.

In the Seventh Circuit case of O'Brien v. Town of Caledonia, the Court was faced with a situation of police being ordered not to issue citations, issuing them anyway, and then having them dismissed by the Police Department.[65] The police officer, Terrance O'Brien, discussed the incidents with his attorney, the local District Attorney, a county

judge, and the FBI office. He also answered questions from the media. The Chief of Police initiated an internal investigation to determine whether he violated Section X, a provision in the police manual against disclosing confidential information. Judge Campell, Senior District Judge for the Northern District of Illinois, sitting by designation, wrote the opinion of the Court and held that: "The evidence indicates that O'Brien took his concerns to the appropriate external authorities and any disruption caused thereby must be considered as incidental. Furthermore, . . . the subject matter . . . was of great public interest and cannot be considered to have been dominated by the co-existing private concerns, i.e., O'Brien's retention of his employment."[66]

Finally, in Knapp v. Whitaker, a teacher-coach complained to the school board about inequitable mileage allowances for coaches and volunteer parents who transported student athletes to school-related events; the extent of liability insurance coverage, and the inefficiency of the grievance process which was then the subject of collective bargaining.[67] Judge Coffey, writing for the Seventh Circuit, ruled first, that Knapp's communication was a matter of public concern and second, that Knapp's communication did not interfere with teaching; did not affect close working relationships; and was done in an appropriate time, place and manner.

IV. CONCLUSIONS

Although it has been only two years since the Supreme Court's decision in Connick, some tentative conclusions about the effects of

the case on the system of public employee freedom of speech can be drawn. First, the two stage test developed in Connick has acted as a force encouraging judicial restraint. Because organizational communication must first be a matter of public concern, it appears that many cases that would ordinarily be open to Pickering balancing are now removed from judicial oversight. It is interesting to note that in the review of cases many judges were incredulous about the heavy-handed, and sometimes corrupt, personnel practices in government agencies but refused to intervene because of the first stage of the Connick test.

Secondly, there seems to be considerable confusion over the timing of comments. Some courts seem to think that public debate on a subject must already be in progress for an employee's comments to be considered a matter of public concern. Others do not make such a requirement.

Finally, the problem of actual or potential disruption clouds the protection of employee free speech. While some courts seem to think that public controversy on an issue makes employees' comments about the issue more strongly matters of public concern, the same strong controversy creates a greater potential threat to the efficiency of a public organization because fellow employees and the public might react to the communication more strongly. Here again, the lower courts seem confused about the standard.

In 1985, the Supreme Court denied the petition for a writ of certiorari in the Rowland v. Mad River Local School District case discussed earlier.[68] However, Justice Brennan, joined by Justice Marshall, wanted to hear the case and dissented. Justice Brennan first addressed the question of whether a controversy in the community needs to be raging in order to classify a

comment as a matter of public concern:

> Connick's reference to 'matters of public concern' does not suggest a strict rule that an employee's first statement related to a volatile issue of public concern must go unprotected, simply because it is the first statement in public debate. Such a rule would reduce public employees to second-class speakers, for they would be prohibited from speaking until and unless others first bring an issue to public attention . . . . It is the topic of the speech at issue, and not whether a debate on that topic is yet ongoing, that Connick directed federal courts to examine.[69]

Secondly, Justice Brennan addressed the open question of whether a matter of little public concern should be protected if there is no disruption. According to Justice Brennan:

> Moreover, if petitioner's speech did not so obviously touch upon a matter of public concern, there reamins a substantial constitutional question, reserved in Connick, whether it lies "totally beyond the protection of the First Amendment" given its nondisruptive character . . . . This case . . . involves no critical statements, but rather an entirely harmless mention of a fact about petitioner that apparently triggered certain prejudices held by her supervisors . . . . This case poses the open question whether nondisruptive speech ever can constitutionally serve as the basis for termination under the First Amendment.[70]

The law after Connick does not suggest that there will be an expansion of the role of the First Amendment in the delicate relationship between the public employee, the public employer, and the general public. Any expanded interventions to regulate organizational communication in government will probably not come from the First Amendment, but, if they come, will come from statutes or common law principles. Yet, there is still considerable confusion by the lower courts concerning the First Amendment rights of public employees. Future cases will probably focus on these issues rather than attempt to expand broadly freedom of speech for public employees.

NOTES

[1] Connick v. Myers, 461 U.S. 138 (1983)

[2] Wayne Sanders, "The First Amendment and the Government Workplace: Has the Consitution Fallen Down on the Job?" Western Journal of Speech Communication, 47 (1983) 253-76.

[3] 391 U.S. 563 (1968).

[4] 391 U.S. 563, 568 (1968).

[5] See: Geringer v. Center School District No. 58, 477 F.2d 1164 (CA8 1973).

[6] See: Janetta v. Cole, 493 F.2d 1334 (4 Cir. 1974).

[7] See: Fisher v. Walker, 465 F.2d 1147 (CA10 1972).

[8] See: Roseman v. Indiana Univ. of Pennsylvania, 520 F.2d 1364 (CA3. 1975).

[9] See: Ayers v. Western Line Consolidated School District, 555 F.2d 1309 (CA5 1977).

[10] 439 U.S. 410 (1979).

[11] 439 U.S. 410, 417 (1979).

[12] Compare Foster v. Ripley, 645 F.2d 1142 (CADC 1981), where objections to an reorganization plan in the Smithsonian Science Information Exchange were found to be of personal concern and had little First Amendment weight, with Myers v. Connick, 654 F.2d 719 (CA5 1981) where complaints by an assistant district attorney over her transfer to another section were found to be Constitutionally protected.

[13] 391 U.S. 563, 569-70 (1968).

[14] 391 U.S. 563, 570 (1968).

[15] 439 U.S. 410, 416 (1979).

[16] See: Long v. Board of Education of the City of St. Louis, 456, F.2d 1058 (CA8 1972).

[17] See: McConnel v. Anderson, 451 F.2d 193 (CA3 1971); Singer v. United States Civil Service Commission, 530 F.2d 247 (CA9 1972); Van Ooteghem v. Gray, 654 F.2d 304 (CA5 1981).

[18] See: Santos v. Miami Region, U.S. Customs Service, 642 F.2d 21 (CA1 1981).

[19] Pickering v. Bd. of Education, 391 U.S. 563 (1968).

[20] Mt. Healthy Board of Education v. Doyle, 429 U.S. 274 (1977).

[21] See: Federation of Teachers v. Board of Education Members, 538 F.2d 471, at 478 (CA2 1976).

[22] See: Kim v. Coppin State College, 662 F.2d 1055, at 1065 (CA4 1981).

[23] See: Battle v. Mulholland, 439 U.S. 321, at 325 (CA5 1971).

[24] 393 U.S. 503 (1969).

[25] See: Tygrett v. Washington, 543 F.2d 840, at 849-50 (CADC 1974).

[26] See: Stern v. Shouldice, 706 F.2d 742 (CA6 1983).

[27] See: Key v. Rutherford, 645 F.2d 880, at 885 (CA10 1981).

[28] 491 F.2d 490, 494 (CA8 1974).

[29] 103 S. Ct. 1684, 1688 (1983).

[30] 103 S.Ct. 1684, 1689-90 (1983).

[31] 103 S.Ct. 1684, 1696, 1699 (1983).

[32] 103 S.Ct. 1684, 1690 (1983).

[33] 103 S.Ct. 1684, 1689 (1983).

[34] 103 S.Ct. 1684, 1696-7 (1983).

[35] 103 S.Ct. 1684, 1692-3 (1983).

[36] 103 S.Ct. 1684, 1693, 1701-2 (1983).

[37] 726 F.2d 670 (CA11 1984).

[38] 730 F.2d 444 (CA6 1984).

[39] 730 F.2d 444, 453 (CA6 1984).

[40] Certiorari denied, 105 S.Ct. (1985).

[41] 732 F.2d 765 (CA10 1984).

[42] 732 F.2d 765, 769 (CA10 1984).

[43] 734 F.2d 1240 (CA7 1984).

[44] 734 F.2d 1240, 1241 (CA7 1984).

[45] 739 F.2d 293 (CA7 1984).

[46] 739 F.2d 293, 296 (CA7 1984).

[47] 623 F.2d 35, 41 (CA7 1980).

[48] 744 F.2d 1418 (CA10 1984).

[49] 745 F.2d 868 (CA4 1984).

[50] 745 F.2d 868, 891 (CA4 1984).

[51] 745 F.2d 868, 891 (CA4 1984).

[52] 755 F.2d 455 (CA5 1985).

[53] 759 F.2d 1171 (CA4 1985).

[54] Lewis v. Blackburn, 734 F.2d 1000 (CA4 1985).

[55] 734 F.2d 1000, 1008 (CA4 1985).

[56] 726 F.2d 670 (CA11 1984).

[57] 726 F.2d 670, 672 (CA11 1984).

[58] 726 F.2d 670, 672 (CA11 1984).

[59] 726 F.2d 670, 676 (CA11 1984)

[60] 732 F.2d 664 (CA8 1984).

[61] 735 F.2d 543 (CA Fed. 1984).

[62] 735 F.2d 543, 545 (CA Fed. 1984).

[63] 736 F.2d 243 (CA5 1984).

[64] 746 F.2d 505 (CA9 1984).

[65] 748 F.2d 403 (CA7 1984).

[66] 748 F.2d 403, 408 (CA7 1984).

[67] 757 F.2d 827 (CA7 1985).

[68] 105 S.Ct. 1373 (Cert. Denied 1985).

[69] 105 S.Ct. 1373, 1375-6 (Cert. Denied 1985).

[70] 105 S.Ct. 1373, 1376 (Cert. Denied 1985).